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No. 1202

In the Supreme Court of the United States

OCTOBER TERM, 1969

JAMES HAROLD ISENRING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, James Harold Isenring, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on January 6, 1970 denying a Petition for a Rehearing, which requested rehearing on Judgment of the United States Court of Appeals for the Seventh Circuit which affirmed a judgment of conviction entered by the United States District Court for the Eastern District of Wisconsin.

CITATION TO THE OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix A hereto, *infra*, page App. 1, is unreported at the present.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals denying the Petition for Rehearing, was entered on January 6, 1970. This Petition for Writ of Certiorari will be timely filed on or before February 5, 1970.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Is an Order to Report for Civilian Work in Lieu of Induction, a violation of the Thirteenth Amendment?

(2) Under Selective Service Regulation 32 CFR, Section 1660.20(d), must the local board authorize and issue a Civilian Work Order, and find such work to be ~~not~~ only "appropriate", but also "available", or may the Clerk or one member of the local board issue such an Order as an "implied conditional order" without such findings by the local board?

(3) When a Selective Service registrant submits new evidence for his classification and requests reopening, must the local board at the very least, make a determination as to whether or not reopening should be granted under the provisions of Selective Service Regulations 32 CFR, Sections 1625.1 through 1625.4, inclusive?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in material part as follows:

> "No person shall be . . . deprived of life, liberty, or property without due process of law; . . ."

The Thirteenth Amendment to the Constitution of the United States provides in material part as follows:

> "Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

REGULATIONS INVOLVED

Selective Service Regulation 32 CFR, Section 1604.59 states in material part as follows:

> "Official papers issued by a Local Board may be signed by the Clerk of the Local Board if he is authorized to do so by resolution duly adopted by and entered in the Minutes of the meetings of the Local Board . . . ."

Selective Service Regulation 32 CFR, Section 1625.1 states in material part as follows:

> "(a) No classification is permanent."

Selective Service Regulation 32 CFR, Section 1625.2 states in material part as follows:

> "The Local Board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant . . . ., if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification . . . ."

Selective Service Regulation 32 CFR, Section 1625.4 states in material part as follows:

> "When a registrant . . . . files with the Local Board a written request to reopen and consider anew the registrant's classification, and the Local Board is of the opinion that the information accompanying such re-

quest fails to present any facts in addition to those considered when the registrant was classified, or, even if new facts are presented, the Local Board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the Local Board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification . . . ."

Selective Service Regulation 32 CFR, Section 1625.11 provides in material part as follows:

"When the Local Board reopens the registrant's classification, it shall . . . . again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened."

Selective Service Regulation 32 CFR, Section 1625.13 provides in material part as follows:

"Each such classification shall be followed by the same right of appearance before the Local Board and the same right of appeal as in the case of an original classification."

Selective Service Regulation 32 CFR, Section 1660.20 (d) states in material part as follows:

"If after the meeting referred to in paragraph (c) of this Section, the Local Board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the Local Board, with the approval of the Director of Selective Service shall order the registrant to report for civilian work . . . ."

STATEMENT OF THE CASE

The Petitioner, James Harold Isenring, was indicted under a charge of violating the Universal Military Training and Service Act, 50 U.S.C.A. Section 462. Specifically, he was charged with willfully and knowingly failing to perform a duty required of him under and in the execution of the Universal Military Training and Service Act in that he was charged with failing and neglecting to comply with an Order of his Local Board to report for civilian work in lieu of induction, after having been classified as a conscientious objector in Class I-O. The Order to Report for Civilian Work in Lieu of Induction ordered him to perform servitude involuntarily, and was not as a punishment for a crime within the meaning of the Thirteenth Amendment to the United States Constitution. The Order itself was issued by the Clerk of the Board, rather than by the Board, and the findings required to be made by the Board were not made, thus, placing the Order in violation of Selective Service Regulations 32 CFR, Sections 1604.59 and 1660.20(d).

A request had been made for reopening of the classification was submission of additional proof of his ministerial entitlement to a IV-D Classification, under the provisions of Selective Service Regulation 32 CFR, Section 1625.1 and 1625.2, but the material was ignored and no independent determination was made by the Board as to whether or not to reopen within the meaning of Section 1625.4, thus, denying the right of appeal permitted under Section 1625.11 and 1625.13.

Mr. Isenring waived trial by jury and entered a plea of "not guilty". His trial was held without a jury before the Honorable Myron Gordon, District Judge for the Eastern District of Wisconsin. On March 6, 1969, the District Judge entered a finding of guilty and remanded Mr. Isenring to the custody of the Attorney General of the United States for a period of two (2) years.

Mr. Isenring timely filed Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, and after hearing the conviction was affirmed by that Court of Appeals. Mr. Isenring now timely filed the Petition for a Writ of Certiorari to the Supreme Court of the United States.

REASONS FOR GRANTING THE WRIT

AN IMPORTANT QUESTION OF FEDERAL LAW HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT:

(1) IS AN ORDER TO REPORT FOR CIVILIAN WORK IN LIEU OF INDUCTION, A VIOLATION OF THE THIRTEENTH AMENDMENT?

The Petition was charged in the Indictment with becoming a Registrant at his Local Selective Service Board and knowingly failing to report for compulsory civilian work in violation of Section 12 of the Universal Military Training and Service Act, Section 462, Title 50, Appendix United States Code.

The Thirteenth Amendment to the United States Constitution states that:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the parties shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

The following factors are, therefore, significant in this case and are clear cut:

(a) The Petitioner, James Harold Isenring, was ordered to perform "involuntary servitude".

(b) The Order was at the express instance of his Local Selective Service Board.

(c) He was not a volunteer.

(d) The result of the Order, if complied with, would be involuntary servitude.

(e) He relied upon the Thirteenth Amendment in not being required to perform such work involuntarily.

(f) The work ordered, was not as punishment for a crime whereof he had been duly convicted.

(g) He is subject to a two-year prison term by reason of Order of the Lower Court for refusing the involuntary Civilian Work Order.

This is a precise constitutional question as to what the intent of the Thirteenth Amendment to the United States Constitution shall be with respect to such an involuntary Civilian Work Order. It is submitted that if the Thirteenth Amendment is not extended to situations such as that raised in this case, that the Thirteenth Amendment is in effect without meaning, that the intent of the framers of the Constitution and Thirteenth Amendment will be completely frustrated, and that the refusal to consider such an important Federal question should not be based upon questions of expediency, or questions as to the effect that there might be in holding that such orders issued for involuntary compulsory civilian servitude are, in fact, in violation of the Thirteenth Amendment.

Clearly, any Order to Report for Civilian Work in the absence of a declared war or state of national emergency would be void and in violation of the Thirteenth Amendment as previously stated, in that it constitutes involuntary servitude, and is not being done as punishment for any crime.

In *Holmes* v. *United States*, 387 F.2d 781, Cert. Denied, 391 U. S. 936 (1967) in the dissenting opinion of Justice Douglas on the denial of certiorari, he pointed out at length that the Supreme Court of the United States has never decided the question of whether a peacetime draft or involuntary conscription is authorized under the Consti-

tution of the United States. In support of his dissenting opinion, he cited various cases showing that the power to draft, when upheld by the Courts, had always been executed at the time when the nation was at war. (Citing *Billings* v. *Truesdell*, 321 U. S. 542; *United States* v. *MacIntosh*, 283 U. S. 605, and *United States* v. *Nugent*, 346 U. S. 1)

It was pointed out that the power to conscript was clearly a part of the war power and therefore, it follows that any Order to Report for Civilian Work, in the absence of a declared war or state of national emergency, would be void and in violation of the Thirteenth Amendment, in that it constitutes "involuntary servitude" and is not being done as punishment for any crime.

The obvious intent of the framers of the Constitution, in view of the Thirteenth Amendment, coupled with the Fifth Amendment provision that no person shall be ". . . . deprived of his life, liberty, or property, without due process of law" is that the liberty, privacy and integrity of the citizen would be inviolate, and not subject to disturbance by the Government, with the possible overriding exception of the necessity of compulsory military conscription in times when a declared war or overriding public emergency and public considerations have been recognized by the Congress as taking precedence.

However, the Congress, having granted an exemption from compulsory military conscription to those who are labeled "Conscientious Objectors", has exceeded the constitutional power granted to it by the United States Constitution as limited by the Thirteenth Amendment in that, having been recognized as an exempt "conscientious objector" he should then be recognized as having the same right of liberty and privacy and to be free of involuntary servitude the same as any other citizen of the United States.

Implicit within the foregoing reasons for the Court assuming jurisdiction, is the contention of the Appellant that, requiring a conscientious objector, who has been found entitled to an exemption from compulsory military service, to perform compulsory civilian work, results in the creation of an arbitrary and discriminatory classification by requiring civilian work to be performed by conscientious objectors only. Other categories of persons who are eligible for the draft, but exempted for various reasons, have nevertheless not been required to perform civilian work in lieu of induction. For example, the general principles of classification are stated in Selective Service Regulations, 1622.1 and 1622.2. Under the various classes are such categories as "I-S: Student Deferred by Statute", "I-Y: Registrant qualified for military service only in time of war or national emergency", "II-S: Registrant deferred because of activity in study", "III-A: Registrant with a child or children; and Registrant deferred by reason of extreme hardship to dependents", "IV-A: Registrant who has had completed service; sole surviving son", "IV-F: Registrant not qualified for any military service", and finally "V-A: Registrant over the age of liability for military service".

In observing these various categories of persons exempt from compulsory military service, only in the case of the physical disability or mental disability of a person classified IV-F, is there is question raised of physical or mental inability to perform civilian service in lieu of induction. All of the other categories, found to be exempt or unavailable for military service, do not require the performance of civilian service in lieu of induction. Cer-

tainly the exemption of persons in those classes from military service, without a corresponding obligation for civilian service in lieu of induction, grants to persons so classified an arbitrary and superior right to that of a person classified as a "Conscientious Objector" who has likewise been found entitled to an exemption but who has then arbitrarily been required to perform civilian services in the nature of involuntary servitude. This arbitrary classification, by discriminating in the manner described, has deprived a person in the classification of "Conscientious Objector" of the equal protection of the law and has deprived them of their life, liberty and property without due process of law in violation of the Fifth Amendment of the United States Constitution.

Under the circumstances shown here, that the Work Order compelled involuntary servitude on the part of James Harold Isenring, that it was not as a punishment for a crime, that there was no declared war or state of national emergency, and that the direct result of his refusal to comply was a two-year sentence to imprisonment in the Federal Penitentiary, that there could not possibly be circumstances under which there could be a more clear-cut violation of the Thirteenth Amendment to the United States Constitution.

THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE SAME MATTER AS FOLLOWS:

(2) UNDER SELECTIVE SERVICE REGULATION 32 CFR, SECTION 1660.20(d), MUST THE LOCAL BOARD AUTHORIZE AND ISSUE A CIVILIAN WORK ORDER, AND FIND SUCH WORK TO BE NOT ONLY "APPROPRIATE", BUT ALSO "AVAILABLE", OR MAY THE CLERK OR ONE MEMBER OF THE LOCAL BOARD ISSUE SUCH AN ORDER AS AN "IMPLIED CONDITIONAL ORDER" WITHOUT SUCH FINDINGS BY THE LOCAL BOARD?

Selective Service Regulation 32 CFR, Section 1604.59 provides as follows:

> "Official papers issued by a local board may be signed by the Clerk of the local board *if he is authorized to do so by resolution duly adopted by and entered into the minutes of the meetings of the local board*, provided that the Chairman or a member of the local board must sign a particular paper when specifically required to do so by the Director of Selective Service." (Emphasis supplied.)

In this case, the Order to Report for Civilian Work (Government Exhibit 13) was signed by Joanne H. Keller, Clerk of Local Board No. 76, rather than by a Chairman or any member of the Local Board. Furthermore, the Selective Service file admitted into evidence reflected that the letter from the State Headquarters to Local Board 76 (Government Exhibit 11) authorized the issuance of the Order only by "the Local Board". In addition, it is evi-

dent that the letter authorizing the issuance of the Order was received by the Local Board on May 1, 1967, and that the Order was issued by the Clerk on May 2, 1967, a lapse of only one day. There was no meeting of the Local Board between receipt of the authorization and between the issuance of the Order on the next day.

There is absolutely no evidence in the record to show that Local Board 76 had ever adopted any resolution authorizing the Clerk of the Local Board to sign official documents, induction orders, or civilian work orders, on their behalf. Furthermore, with the receipt of authorization having come to Local Board 76 on May 1st and the Clerk having issued the Order on May 2nd, with no meeting of the Board, it is apparent that the Local Board did not authorize the Clerk in any way to execute the Order on their behalf.

It is obvious that the Order is further void by reason of its violation of Selective Service Regulation 32 CFR, Section 1660.20(d), which provides:

> "If, after the meeting referred to in paragraph (c) of this Section, the Local Board and the Registrant are still unable to agree on a type of civilian work that should be performed by the Registrant in lieu of induction, *the Local Board*, with the approval of the Director of Selective Service, *shall order the Registrant to report for civilian work* contributing to the maintenance of the national health, safety or interest . . . ." (Emphasis supplied.)

The only meeting of the Board at which this matter came up was a meeting of February 13, 1967 with the State Director to attempt to agree on a type of work to be performed. (Government Exhibit 33). The only reference to a possible Civilian Work Order is the recital of the Clerk

that ". . . . the Local Board determined that hospital work at Madison General Hospital was appropriate and available, and that the Director of Selective Service be requested to authorize the issuance of an Order to the Registrant to perform such work."

The Local Board did not:

(a) Direct that such an Order issue.

(b) Direct that such an Order be issued upon receipt of authorization from the Director of Selective Service.

(c) Direct that the Clerk issue such an Order; or

(d) Direct that the Clerk issue such an Order after authorization had been received from the National Director.

The Local Board only made certain findings and "determinations" and then took no action with respect to an Order at all as required by Section 1660.20(d).

The history of cases under 32 CFR, Section 1660.20(d) is varied and confusing, and the present status of cases ignores the clear language of the Regulations and involves an important question of Federal Law which should be decided by this Court to eliminate the confusion between the various decisions.

The primary cases had originally been *Brede* v. *United States,* 396 F.2d 155, modified 400 F.2d 599 (9th Cir. 1968). Under the ruling in that case, and its direct application to the circumstances in this case, the Court of Appeals would have been required to reverse the conviction and dismiss the Indictment. In addition, in *Hestad* v. *United States,* No. 17398 (C.A. 7, Nov. 7, 1969) and *Cupit* v. *United States,* No. 17397 (C.A.7, Nov. 7, 1969), the Court of Appeals for the Seventh Circuit distinguished

the *Brede* decisions, and in doing so, reversed an Order of the United States District Court for the Western District of Wisconsin in which Judge Doyle had vacated a prior Order of Conviction and discharged *Hestad* and *Cupit* by reason of the ruling in the *Brede* case.

To compound the problem, the Court of Appeals for the Ninth Circuit on November 28, 1969 to at least some extent, reversed its prior position as expressed in the two *Brede* Cases. *United States* v. *Stark*, Docket No. 22994 (9th Cir. November 28, 1969). In the *Stark* Case, the Ninth Circuit held that:

> ". . . . we are of the view, and so hold, that where, as here (and in Brede), the Board's determination includes not only the type of employment deemed appropriate but also the employer to whom the registrant is to report, the critical exercise of administrative judgment by the Board has been made, and an Order to Report to the specified employer (subject to authorization of the National Director) is implicit and the action of the Clerk in issuing the Order is merely ministerial implementation. To this extent *Brede* is hereby overruled."

Thus, it is apparent that not only in the *Stark* decision, but also in the *Cupit* and *Hestad* reversals by the Court of Appeals for the Seventh Circuit, that the plain language of the Regulation in 32 CFR, Section 1660.20(d) is ignored as it requires that ". . . . the Local Board . . . . shall order the Registrant to report . . . ."

Therefore, it is contended here that this Court should take jurisdiction and decide this question, raised in so many District and Courts of Appeals at the present time to eliminate the confusion and to decide whether, in the light of the foregoing Regulation, an Order issued by a

Clerk of a Local Board without an Order or authorization from the Local Board, is a valid or a void Order. It is contended that such an Order is void and deprives the Registrant of the clear language of the Regulation, and of due process of law within the meaning of the Fifth Amendment to the United States Constitution in that it leaves the final determination of whether the Order issues, to the discretion of a ministerial clerk and deprives him of the final right to have his file reviewed by the Local Board to determine whether such an Order should be issued, before the Order is actually issued.

THAT THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR SO FAR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AND EXERCISE THIS COURT'S POWER OF SUPERVISION AS FOLLOWS:

(3) WHEN A SELECTIVE SERVICE REGISTRANT SUBMITS NEW EVIDENCE FOR HIS CLASSIFICATION AND REQUESTS REOPENING, MUST THE LOCAL BOARD AT THE VERY LEAST, MAKE A DETERMINATION AS TO WHETHER OR NOT REOPENING SHOULD BE GRANTED UNDER THE PROVISIONS OF SELECTIVE SERVICE REGULATIONS 32 CFR, SECTIONS 1625.1 THROUGH 1625.4, INCLUSIVE?

On September 19, 1966 James H. Isenring wrote an extensive letter to Local Board 76 (Government Exhibit 17) and pointed out that he was a "minister dedicated to serving Jehovah God". He also pointed out that "as a dedicated minister, I have devoted my life to the service of Jehovah and cannot accept a compromising stand toward

that dedication (John 15:19)." In addition, he attached to that letter a letter of June 22, 1966 (Government Exhibit 18) from the Watchtower Bible and Tract Society of New York, Inc. certifying that James H. Isenring was a duly ordained minister of Jehovah's Witnesses, that he presently officiates as an Assistant Presiding Minister in the Brookfield, Wisconsin congregation and that he regularly and customarily engages in preaching and teaching the tenets and principles of Jehovah's Witnesses as a missionary evangelist, and that he was authorized to perform the ordinary rights and ceremonies of that religion. In addition, in that letter he stated that, "I hereby make an appeal to the Appeal Board that my file be examined anew, so that I will be considered as a minister of Jehovah God (IV-D)." At the time of making the request for the reopening of his classification, he was classified I-O, Conscientious Objector.

By letter of October 5, 1966, Joanne H. Keller, Clerk of Local Board 76, acknowledged receipt of the new and additional information and of his request for reopening by her letter (Government Exhibit 19). That, however, is the last reference in the file to those newly produced exhibits of Mr. Isenring and of his request for a reopening of his classification. There is no evidence that those matters were ever placed before Local Board 76 for consideration, by the Clerk, nor is there any other reference in his entire file other than that made by the Clerk in her letter acknowledging their receipt.

It has been held that failure to reopen the classification, upon written request therefore, constitutes a denial of the Registrant's procedural rights and standing alone constitutes grounds for reversal of the conviction. In *Ransom* v. *United States*, 223 F.2d 15 (7th Cir. 1955) it was held that not only must there be a basis in fact for the

denial of the IV-D Classification, but that there must also be a basis in fact for *refusal to reopen* the classification.

Under the Selective Service Regulations as previously quoted in this Petition, Section 1625.1 and Section 1625.2 clearly indicate that in determining whether there should be a reopening or not, the Local Board shall at least meet and consider the information and make some independent determination as to whether a reopening should be granted. Section 1625.4, then, covers the notice to be given to the Registrant in the event that they refuse to reopen.

The importance of the Board making the independent decision as to whether or not to reopen, is apparent from the reading of Section 1625.11 and 1625.13 which are previously quoted in detail at the beginning of this Petition. It is apparent that if the classification is reopened, the Board may still retain the same classification or may reclassify. In any event, whether they retain the same category or reclassify 1625.11 provides that "such classification shall be and have the effect of a new and original classification even though the Registrant is again placed in the class that he was in before his classification was reopened." And, 1625.13 provides that each such classification shall be followed by the same right of appearance . . . . and the same right of appeal as in the case of an original classification."

In this case, the correspondence and exhibits supplied by Mr. Isenring were obviously never even considered by the Local Board. They did not:

(a) Review the information.
(b) Decline to reopen.
(c) Grant the reopening.

In effect, they refused the clear statement of the Regulations and their benefit to Mr. Isenring. If they had re-

fused to reopen they would have been obligated to give the notice provided by Section 1625.4, which they did not do. If they had reopened and retained Mr. Isenring in the I-O, Conscientious Objector, category, without reclassifying him to the IV-D, Minister of Religion, classification, he would have had a right of appeal under Section 1625.13. See, for example, *Robertson* v. *United States,* 404 F.2d 1141, (5th Cir. 1968). The holding in *Robertson* is directly contrary to that of the 7th Circuit in this decision in Isenring and is also contrary to the prior decision of the 7th Circuit itself, in *United States* v. *Ransom,* 223 F.2d 15 (7th Cir. 1955). The 5th Circuit, sitting En Banc, reversed the *Robertson* case, *Supra,* but on other grounds which related to the vacation pioneer status of the minister of Jehovah's Witnesses who was involved in that case. It did not involve the question of reopening in the substance for the reversal of the case En Banc in *Robertson* v. *United States,* Docket No. 25099 (5th Cir. September 25, 1969).

CONCLUSION

This case, thus, presents these three important Federal, Constitutional and legal questions in a clearly justiciable setting. It is respectfully submitted that this Court should issue its Writ of Certiorari in order that it may fully consider and determine these questions, and in order that they might be fully briefed and argued by the Petitioner, and it is prayed that this Court will issue its Writ of Certiorari to the Court of Appeals for the Seventh Circuit to review its Judgment in this case.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 17486 SEPTEMBER TERM, 1969 SEPTEMBER SESSION, 1969

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES HAROLD ISENRING,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.

December 17, 1969

Before CASTLE, *Chief Judge,* HASTINGS, *Senior Circuit Judge,* and KILEY, *Circuit Judge.*

KILEY, *Circuit Judge.* Defendant was convicted by the district court, without a jury, of willful failure to report to his draft board for civilian work after having been classified as a conscientious objector in class I-O.[1] He has appealed. We affirm.

[1] His sentence of two years was suspended and he was placed on probation for two years.

After filing an initial classification questionnaire with his draft board, defendant executed and returned to the board a Special Form of Conscientious Objector. The board, following defendant's personal appearance before it, classified him I-A. He was subsequently classified I-O by the appeal board. He then met with the local board for a discussion of suitable civilian work to be substituted for military service. Later he was ordered to report for work in a hospital. He failed to report and was indicted, tried, and convicted. This appeal followed.

The issues before us are: (1) whether the civilian work order, as signed by the clerk of the board, is void as offending Selective Service Regulation 32 C.F.R. § 1604.59; (2) whether the order was not an order of the local board and thus violative of Section 1660.20(d); (3) whether there is basis in fact for the refusal to classify him IV-D, a minister of religion; (4) whether the board abused its discretion in refusing to reopen the I-O classification; and (5) whether the order issued at an unlawful time sequence and in violation of Section 1660.20(a), (b), (c) and (d).

Defendant's file contains a summary of the meeting held with the local board at which alternatives in civilian work were discussed. The minute state that on February 13, 1967:

> No agreement was reached between the registrant and the local board as to a type of civilian work that this registrant would perform in lieu of induction.
>
> The local board determined that hospital work at Madison General Hospital was appropriate and available, and that the Director of Selective Service be requested to authorize the issuance of an order to the registrant to perform such work.

The clerk wrote the national director pursuant to the board's request. In a letter of April 25, 1967, the local board received authority from the national director to authorize the civilian work the board considered appropriate. The order to report thereafter issued, signed by the clerk, without a further meeting of the board to authorize the clerk to sign it.

Defendant initially contends that the order and his conviction based upon it are void because there was no proof in the record that the board authorized the clerk to *sign* this "official paper" under Section 1604.59.[2] In the absence of proof to the contrary, we believe the judicially recognized presumption in favor of the regularity of board proceedings defeats this contention of the defendant. It was incumbent upon the defendant to prove that the signing of the order by the clerk was an unauthorized action. *United States* v. *Crowley*, 405 F.2d 400, 403 (4th Cir. 1968), *cert. denied*, 394 U.S. 904 (1969); *Rhyne* v. *United States*, 407 F.2d 657, 660 (7th Cir. 1969).

A more substantial question is presented with defendant's second contention that the order to report for civilian work was in violation of Section 1660.20(d) because the local board did not meet, with the approval of the

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[2] 32 C.F.R. § 1604.59 provides:

> Official papers issued by a local board may be signed by any compensated employee of the local board if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the local board. . . .

Director of the Selective Service, "to order the registrant to report for civilian work."[3]

Defendant relies on *Brede* v. *United States*, 396 F.2d 155 (9th Cir. 1968) *(Brede I)*, which held that, in order to comply with Section 1660.20(d), a local board, after receiving authorization from the national director, should then meet and order the registrant to report for civilian work. However, *Brede* was subsequently modified in a per curiam opinion (400 F.2d 599 (9th Cir. 1968)) *(Brede II)* which stated that though the order must specify the civilian job, the meeting resulting in the order need not be held after the director's approval. The modified opinion recognized as meritorious the contention that a board's recommendation following the meeting with the registrant required by Section 1660.20 may constitute an implied order to report, subject to the national director's approval, if the record discloses that the action of the board comports with its usual administrative construction and practice. Defendant argues that *Brede I* is the proper decision, but that even on the basis of *Brede II* his conviction should be reversed, since there was no evidence in the record of the administrative construction and procedure of the local boards in Wisconsin.

Since submission of briefs and oral argument in this case, two important developments have occurred which

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[3] 32 C.F.R. § 1660.20(d) provides:

> If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest. . . .

shed light on the issue now being discussed. This court in the consolidated cases, *Hestad* v. *United States*, and *Cupit* v. *United States* ..... F.2d ....., Nos. 17398 and 17404, slip opn. Nov. 7, 1969, dealt with a situation where the facts were virtually the same as those before us. The court decided to follow *Brede II* as the correct interpretation of Section 1660.20(d). It determined that the essential element in both *Brede* decisions is that the local board must deliberate upon and approve a reasonably definite proposition ordering the registrant to report for civilian work. On the facts before it, this court set aside the district court findings that there was insufficient evidence in the record that the boards engaged in the "critical exercise of administrative judgment" required by *Brede II*.

The only factual difference between *Hestad* and *Cupit* and the case before us now is that in those cases, in addition to the minutes of the board meeting, there was supplemental testimony that the boards involved followed the administrative practice of all local boards in the state of Wisconsin wtih respect to the procedure applied to these two registrants. There is no testimony before us of administrative practices.

We do not think it is necessary, in order to sustain the defendant's conviction, for the record before us to show the administrative practice of draft boards with respect to the issuance of these civilian work orders. This court in *Hestad* and *Cupit* cited as "almost identical" the facts in the Fourth Circuit decision in *United States* v. *Crowley*, 405 F.2d 400, 403 (1968), which upheld the defendant's conviction, without supplemental testimony of board practice, on the basis that the recommendation of the board alone that the registrant undertake civilian work was itself sufficient to satisfy the requirements of Section

1660.20(d). More importantly, whatever argument might be offered that the decisions of the Ninth Circuit in *Brede* require the existence of supplemental testimony of administrative practice has now been rendered invalid by the recent decision in *United States* v. *Stark*, ... F.2d ....., No. 22994 (9th Cir., slip opn. Nov. 28, 1969). There the court held as sufficient the board's determination of the type of employment deemed appropriate, and the employer to whom the registrant is to report. Thus, a showing of the "critical exercise of administrative judgment" is all that is necessary to sustain the subsequent "ministerial implementation" of the board's judgment by the clerk.

We conclude that the board in the case before us substantially complied with the requirements of Section 1660.20(d) as enunciated by this Circuit in *Hestad* and *Cupit*, and by the Fourth and Ninth Circuits, respectively, in the *Crowley* and *Stark* decisions.

Defendant next contends that there was no basis in fact for the refusal of the board to classify him IV-D as a minister of religion. He sought a ministerial exemption after the board had initially classified him I-A. Prior to the time when the appeal board reclassified him I-O, defendant submitted to the board the following information: that he was a minister of the Watchtower Society, a student preparing for the ministry, that he devoted thirteen hours per week to ministerial activity and worked forty hours per week as a carpenter. These statements were supported by personal affidavits. With this information before it, on June 13, 1966 the board affirmed his I-A classification. On August 15, 1966 the appeal board reclassified the defendant I-O, as a conscientious objector. On September 19, 1966 defendant requested reopening

of that classification, and again sought the IV-D ministerial exemption. He submitted to the board a certificate executed by the Assistant Superintendent of Ministers and Evangelists stating that the defendant was an ordained minister, an assistant presiding minister of his congregation, a book study conductor presiding over bible studies, and was regularly engaged in preaching and teaching. The board acknowledged receipt of this material, but the classification was not reopened.

We see no merit in the defendant's argument that the board did not consider any of the information submitted relating to the ministry. The summary of the June 13, 1966 board meeting shows that the local board has already considered the essential information pertaining to his ministry claim when it classified him I-A. The file was, at that time, forwarded to the appeal board where the information was once again considered, and the classification changed to I-O. Defendant further claims that the board did not consider his request for reclassification made by the introduction of information on September 19, 1966. The defendant's file makes no mention of a meeting to consider this request. In the absence of clear evidence to the contrary, the presumption in favor of the regularity of official proceedings of the board prevails here. *Yeoman* v. *United States*, 400 F.2d 793, 797 (10th Cir. 1968).

This court also finds without merit defendant's argument that he made out a prima facie showing that he was entitled to a ministerial exemption, and that the board presented no facts in his file to negate this showing. The Supreme Court case of *Dickinson* v. *United States*, 346 U.S. 389, 395 (1953), notes that preaching or teaching the principles of one's sect, if performed part-time or half-time,

occasionally or irregularly, is insufficient to satisfy the "rigid criteria" for a ministerial exemption. Defendant's file contains information that he did ministerial work regularly, but less than one-third of his actual working time. Defendant must demonstrate that the ministry was his "customary vocation." *United States* v. *Kushmer*, 365 F.2d 153, 155 (7th Cir. 1966).

Defendant further argues that there was no basis in fact for the board's refusal to reopen his classification. We believe there was nothing in the file before or after classification which is contrary to defendant's statements about his substantial carpentry work and religious activity. The material submitted to the board on September 19, 1966 does not contradict these statements, and only reiterates defendant's religious commitments. This was not new evidence "presenting facts not considered when the registrant was classified" as required for a reopening under Section 1625.2. The record clearly shows there was a basis in fact for the board's refusal to reopen his classification.

Defendant also complains of the board's failure to send a letter notifying him of the refusal to reopen his classification as required by Section 1625.4. No letter was sent. However, events occurring subsequent to the request for reopening put defendant on notice of the board's action Acknowledgment of receipt of the request was given by the board on October 5, 1966. Thereafter, processing for civilian work began, for on December 12, 1966 defendant wa requested to designate a type of civilian work he favored in lieu of induction. On February 13, 1967 he had a meeting with the board to discuss civilian work. And, finally, the order to report issued. We believe no prejudice

was shown, and defendant was made sufficiently aware that his request to reopen the classification had been denied. *Yeoman* v. *United States,* 400 F.2d 793, 796 (10th Cir. 1968).

Finally, defendant relies upon a violation of Section 1660.20(a), (b), (c), (d) to seek a reversal of his conviction. Each subsection there provides, in regard to civilian work orders, that

> . . . such orders shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

The basis of this provision is that a conscientious objector should not be called for civilian work, if he would not have at that time been ordered for military duty. Defendant's name appeared upon the delivery list of January 16, 1967, to be ordered to report for induction had he been classified I-A. The civilian work order was issued three months later, in May, 1967. We believe the issuance on that date sufficiently satisfies the mandate of Section 1660.20 that defendant be called in sequence. We do not read that Section as requiring that the defendant have been eligible for order of induction in May, when the order issued.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES HAROLD ISENRING,

Defendant.

INDICTMENT
No. 67-Cr-151

(T. 50 App., Sec. 462, U.S.C.)

THE GRAND JURY CHARGES:

That on or about the 17th day of May, 1967, at the City of Waukesha, Waukesha County, in the State of Wisconsin, within the confines and jurisdiction of the United States District Court for the Eastern District of Wisconsin, the above-named defendant,

JAMES HAROLD ISENRING,

did knowingly, wilfully and unlawfully fail to perform a duty resting upon him under the Universal Military Training and Service Act and the Regulations in that, having been classified as a conscientious objector, in Class I-O, he did wilfully and knowingly fail to report to his Local

Board No. 76, Waukesha County, Room 207, Old Court House, Waukesha, Wisconsin, as required by SSS Form No. 153, Order to Report for Civilian Work; all in violation of Section 462, Title 50, Appendix, United States Code of Laws.

A TRUE BILL:
Dated: Oct. 10, 1967
/s/ George E. Fikes
Foreman

/s/ James B. Brennan
United States Attorney

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Office-Supreme Court, U.S.
FILED
MAR 20 1970
JOHN F. DAVIS, CLERK

No. 1202

In the Supreme Court of the United States

OCTOBER TERM, 1969

JAMES HAROLD ISENRING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1969. A petition for rehearing was denied on January 6, 1970. The petition for a writ of certiorari was filed on February 19, 1970.[1]

[1] The petition itself was delivered to the Clerk of this Court on February 5, 1970, within the period fixed by Rule 22–2 of the Rules of the Court, but no certified record was filed at that time. In a letter dated February 17, 1970, counsel for petitioner stated that on January 23, 1970, an order was obtained directing the Clerk of the Seventh Circuit to transmit the record to this Court, but that the Clerk inadvertently failed to do so. Since the matter is essentially one of docketing, the government raises no issue as to timeliness. Cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 84–86. Compare Brief for the United States in *Schacht* v. *United States*, No. 628, this Term, at pp. 9–21.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the order to petitioner to report for civilian work in lieu of induction contravened the Thirteenth Amendment.

2. Whether the order to report for civilian work, signed by the clerk of the local Selective Service board, complied with the requirements for an authorized order as set out in 32 C.F.R. 1660.20(d).

3. Whether the local board erred in failing to reopen the petitioner's I–O classification where the alleged new information relating to his claim of a ministerial exemption had already been considered by the board.

REGULATIONS INVOLVED

32 C.F.R. 1660.20 provides, in pertinent part:

* * * * *

> (c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. * * *
>
> (d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction,

> the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work * * *.

32 C.F.R. 1625.2 provides, in pertinent part:

> The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant * * *, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification * * *.

32 C.F.R. 1625.4 provides:

> When a registrant * * * files with the local board a written request to reopen and consider anew the registrant's classification, and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified, or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification * * *.

STATEMENT

After a non-jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of wilfully and knowingly failing to report for civilian work in lieu of induction as

ordered, in violation of 50 U.S.C. App. 462. On March 6, 1969, he was sentenced to probation and ordered to report to Madison General Hospital for two years of civilian work. The court of appeals affirmed (Pet. App. 1–9).

The evidence showed that in June 1965 petitioner filed a Classification Questionnaire with his local board stating that he was working as a carpenter apprentice for forty hours a week; that he was a minister in the Watchtower Bible and Tract Society of Jehovah's Witnesses; and that he was a conscientious objector (Exh. 4).[2] In July 1965, petitioner executed a Form 150, requestiong his local board to classify him as a conscientious objector (Exhs. 51, 52).

After being classified I–A in December 1965, petitioner was given a physical examination and found to be fit for military service (Exhs. 47, 57). In February 1966 petitioner submitted a Current Information Questionnaire (Exh. 44) and requested a personal interview, enclosing affidavits from two ministers to reinforce his claim that he was a minister in Jehovah's Witnesses (Exh. 46). At his personal appearance before the local board on June 13, 1966, petitioner reiterated his claim to a ministerial exemption. He indicated he was an assistant presiding minister of the Brookfield congregation and a book study conductor. He also disclosed that he devoted about 13 hours a week to ministerial duties and worked 40 hours a week as a carpenter. The local board again classified petitioner as I–A (Exh. 38). On appeal, the ministerial

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[2] "Exh." refers to exhibits filed by the government in district court.

claim was not sustained, but petitioner's classification was changed to I–O (conscientious objector), in August 1966 (Exhs. 37, 16).

After being classified I–O by the State Appeal Board, petitioner, on September 19, 1966, wrote a letter to the local board reasserting his claim that he was a minister. To this he attached a letter of the Watchtower Society, dated June 22, 1966, which certified that his position was assistant presiding minister of the Brookfield congregation. He stated: "I hereby make an appeal to the Appeal Board that my file be examined anew, so that I will be considered as a minister of Jehovah God" (Exhs. 17, 18). The local board acknowledged receipt of these documents on October 5, 1966 (Exh. 19).

On December 12, 1966, petitioner was asked to designate which of three types of civilian work he would choose, but he declined to do so (Exhs. 25, 26). On February 13, 1967, petitioner met with the local board to discuss civilian work alternatives available to him. The report of the board states (Exh. 33):

> No agreement was reached between the registrant and the local board as to a type of civilian work that this registrant would perform in lieu of induction.
>
> The local board determined that hospital work at Madison General Hospital was appropriate and available, and that the Director of Selective Service be requested to authorize the issuance of an order to the registrant to perform such work.

On April 25, 1967, the local board received authorization from the National Director of Selective

Service to issue an order requiring petitioner to perform the type of civilian work it deemed appropriate (Exh. 36). A letter dated May 2, 1967, signed by the clerk of the local board, ordered petitioner to report for civilian work at the Madison General Hospital on May 17, 1967 (Exh. 13). Petitioner failed to report as directed (Exhs. 7, 8, 9, 10).

ARGUMENT

1. It has been consistently held that an order to report for civilian work in lieu of induction does not contravene the Thirteenth Amendment. Under the congressional power to conscript it may determine that, as to conscientious objectors, civilian work is an acceptable alternative to compulsory military service. *E.g., United States* v. *Higgins*, 416 F. 2d 406 (C.A. 2); *United States* v. *Chandler*, 403 F. 2d 531 (C.A. 4); *United States* v. *Holmes*, 387 F. 2d 781, 784 (C.A. 7), certiorari denied, 391 U.S. 936.

2. Petitioner argues that the local board did not issue an order to report for civilian work, as required by 32 C.F.R. 1660.20(d), since there was no showing that, after it received authorization from the National Director, it directed the clerk to issue the order to report for civilian work. It is clear, however, that after meeting with petitioner the board deliberated and directed the assignment of petitioner to civilian work at the Madison General Hospital, as long as subsequent authorization by the National Director was obtained. It was not necessary for the board to meet again to reaffirm this order; the action of the clerk of the board in signing and mailing a notice thereof to petitioner was no more than a min-

isterial implementation of the earlier order. All the circuits which have considered the issue have now so held. *United States* v. *Stark*, 418 F. 2d 901 (C.A. 9), certiorari denied, March 2, 1970, No. 1488 Misc., this Term; *United States* v. *Hilgeneck*, 418 F. 2d 233 (C.A. 6), certiorari denied, February 24, 1970, No. 923, this Term; *United States* v. *Powers*, 413 F. 2d 834 (C.A. 1), certiorari denied, 396 U.S. 923; *United States* v. *Crowley*, 405 F. 2d 400, 403 (C.A. 4), certiorari denied, 394 U.S. 904. See also Pet. App. 3–6.

3. Petitioner argues that his letter of September 19, 1966, was a request for reopening of his classification; that the record fails to show that the board considered the request and that he was never notified of any action thereon by the board. We do not believe the letter of September 19 was a request for reopening; it was in terms a request for reconsideration by the appeal board. The only "information" offered was a letter of June 22, 1966, a date prior to when the appeal board had acted on petitioner's appeal in August 1966.

In any event, petitioner clearly presented no basis for reopening his classification. The local board already knew that petitioner claimed a ministerial exemption as assistant presiding minister and book study conductor of the Brookfield, Wisconsin, congregation; his September letter contained no new information in this regard. If there was any defect in the procedure followed, petitioner's rights were in no respect affected thereby. Even if the board should have notified petitioner that his claim was not deemed

to present new information, petitioner was surely made aware of that fact on December 12, 1966, when he was requested to designate one of the three types of civilian work offered in lieu of induction. Indeed, at the meeting in February 1967 to discuss civilian work alternatives, petitioner "agreed that his file was complete and understood by him" (Exh. 33).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1970.

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